

10056 Ability to Comply with Remedy

Unless the charge is clearly nonmeritorious, Board agents should be alert to, and continually assess, the charged party's ability to comply with any remedy which may be sought by the Agency. Any issues of potential inability to remedy the alleged unfair labor practices should be promptly and thoroughly investigated. Such investigation may be triggered by the circumstances set forth in Sec. 10600.2, Compliance Manual.

Following the investigation of these issues, it may be appropriate to seek protective relief (see Sec. 10594.2, Compliance Manual) or take other appropriate action, such as to seek amendment of the charge to name other charged parties, including any alter ego, successor or individual, as derivatively liable for remedying the alleged unfair labor practices. Charging party and witnesses should be advised to notify the Board agent immediately of any significant change in the charged party's operation, identity or financial condition so that appropriate action can be taken.

10058 Contacts with Represented Parties and Witnesses

All parties and witnesses are entitled to be represented by attorneys or other representatives. The Agency's policies regarding contacts with represented parties and witnesses and guidance for compliance with those policies are set forth in this section and may be revised as new developments occur.

The Agency's policies have been formulated in consideration of both the ethical standards applicable to Agency attorneys as members of the bar, particularly the American Bar Association's Model Rule of Professional Conduct 4.2 (MR 4.2) (formerly Sec. 7-104(A)), and the Board's Rules and Regulations, while permitting vigorous and orderly administration of the Act. As a general rule, unless otherwise authorized by law, all attorneys, including Agency attorneys, must comply with the ethics codes adopted by their licensing State or States and/or those adopted by the state in which their contact with the witness occurs, and with the ethics codes adopted by the Federal courts before which they appear. Although ethics rules may vary from jurisdiction to jurisdiction, all State bar and Federal court ethics codes contain essential elements of MR 4.2.

MR 4.2 prohibits contact with a person whom an attorney knows to be represented by an attorney in the ULP case, without the prior consent of that attorney. As a matter of Agency policy, all Board agents, including field examiners, will be held to the same standards as attorneys. Further, because MR 4.2 does not apply to representatives who are not attorneys, at times the instructions contained herein for communicating with parties may differ significantly depending on whether the parties are represented by attorneys or by individuals who are not attorneys.

Since the interpretation of ethics rules varies from jurisdiction to jurisdiction and may result in disciplinary sanctions against Agency attorneys who violate ethics rules, the Regional Office must contact the Special Litigation Branch in the circumstances set forth in Secs. 10058.2(b) and (d), 10058.4(c), and the first of the options set forth in Secs. 10058.5(a) and (b).

For jurisdiction-specific ethics questions, Special Litigation must determine which ethics rules govern the Regional Office's investigation of the case. Specifically, in determining the relevant ethics rules for purposes of a Rule 4.2 analysis, Special Litigation examines the ethics rules of the licensing jurisdiction of the Board attorney conducting the investigation, or of the supervisory attorney if the investigation is being conducted by a field examiner. Also relevant are the ethics rules of the situs of the contact and of any eventual trial. Special Litigation first determines which jurisdiction(s) would assert disciplinary authority over the contact and second, as a choice-of-law matter, which jurisdiction's ethics rules would apply.

If a case in which a skip counsel issue arose during investigation is appealed to the Office of Appeals or submitted to the Division of Advice, the Regional Office should note the following in its Comment on Appeal or Advice submission:

- The precise skip counsel issue or issues.
- How such issue(s) was/were resolved, with reference to any ethics guidance given by Special Litigation and inclusion of that guidance in the case file.
- Which jurisdiction or jurisdictions' ethics rules governed the investigation.
- Any witnesses the Regional Office either was told it could not interview ex parte or was aware that it could not interview ex parte based on Special Litigation's guidance distributed agency-wide.
- Whether the Regional Office was proffered a witness statement that it could not use in the investigation. Such statements that are part of the case file should be segregated in sealed and clearly marked envelopes before sending the file with such statements to the Appeals or Advice.

If, while the case is in Appeals or Advice, any party proffers a witness who is a former or current supervisor/agent of an organization represented by counsel, Appeals or Advice will assess the appropriate course of action and, if necessary, consult with Special Litigation. See generally OM Memo 05-63. As a choice-of-law matter, for purposes of considering ethics obligations of attorneys in Appeals in connection with an appeal of the dismissal of a charge or Advice in connection with a case submitted to Advice, the relevant ethics rules to be followed are those that governed the Regional Office's investigation of the case. See generally OM Memo 05-63 and also Secs. 10122.8 and 11750.1.

10058.1 Notice for Receipt of Documents/Notice of Appearance

(a) *Notice for Receipt of Documents:* An attorney or other representative may submit to a Regional Office an Annual Notice for Receipt of Charges and Petitions (Form NLRB-4702), or its equivalent, for all matters involving a particular client coming before the Regional Office. Such a notice should be honored by the Regional Office for the 12-month period specified.

If an individual wishes to represent a party in a specific case, a specific Notice of Appearance, Form NLRB-4701, or its equivalent, must be filed with the Regional Director.

(b) *Notice of Appearance:* Regional Offices should provide parties Form NLRB-4701 with the service of all charges filed. Upon receipt of a completed Form NLRB-4701, or its equivalent, signed by an attorney or other representative, all communications with the party should be through such attorney or representative, except:

- If the party's representative is an attorney, the Regional Office may communicate with and/or serve documents on the party with the consent of the attorney.
- Even absent such consent from the attorney, the Regional Office should serve on the party certain documents as set forth in Sec. 11842.3. Further guidance in this regard is provided in Secs. 11842 through 11844.3.
- If the party's representative is not an attorney, the Regional Office may serve documents and other correspondence on both the representative and the party but should otherwise communicate with the party and its supervisors/agents in accordance with the guidelines set forth in Secs. 10058.3 and 10058.5.

10058.2 Supervisors/Agents of Parties Represented by Attorneys

The following policies apply to contacts by Board agents, whether attorneys or field examiners, with supervisors or agents of a party represented by an attorney. For situations where a party is not represented by an attorney, i.e., where MR 4.2 does not apply, see Sec. 10058.3.

(a) *Current Supervisors/Agents of Party:* Where the Regional Office has been advised that a party is represented by an attorney, a Board agent must contact and obtain consent from the party's attorney before initiating contact with or interviewing a current supervisor or agent, except for the circumstances described in (b), (c), and (e) below. Absent such circumstances, if the party's attorney refuses to make a current supervisor/agent available for questioning, the Board agent cannot proceed with the interview. The Regional Office may, however, exercise any of the appropriate options set forth in Sec. 10058.5 respecting uncooperative conduct by parties.

(b) *Current Supervisors/Agents Who Come Forward Voluntarily:* If current supervisors or agents come forward voluntarily and indicate that they do not wish to have the party's attorney present, the Regional Office must contact the Special Litigation Branch before interviewing or taking a statement from such a witness.

(c) *Uncertain Supervisory/Agency Status:* In cases involving individuals whose supervisory or agency status is initially uncertain, a Board agent should inquire about the individual's status prior to conducting a substantive interview and proceed as follows:

- If it becomes clear that the individual is a supervisor or an agent of a party, the Board agent cannot proceed with the interview without the consent of the party's attorney.

- If it remains unclear whether the individual is a supervisor or an agent of a party, the Board agent should interrupt the interview and consult with the Regional Office.
- If the Regional Office concludes that the individual is a supervisor or agent of a party, the Board agent may not resume the interview without the consent of the party's attorney.
- If, on the other hand, it becomes clear either through the preliminary interview or through consultations with the Regional Office that the individual is not a supervisor or agent of a party, the Board agent may conduct the substantive interview of the witness without informing or obtaining consent from the party's attorney.

(d) *Former Supervisors/Agents:* Jurisdictions have differing approaches with respect to ex parte communications with former supervisors or agents of a party represented by an attorney. The Special Litigation Branch will authorize Regional Offices to contact and interview witnesses ex parte where permitted by the applicable jurisdiction(s). If the proposed interview would occur in a jurisdiction and under circumstances in which Special Litigation guidance distributed agency-wide has authorized such contacts, prior clearance is not required before interviewing former supervisors or agents of a represented party without consent of the party's attorney. In all other cases, the Regional Office must contact the Special Litigation Branch before conducting such interviews.

(e) *Supervisors/Agents as Charging Parties and Alleged Discriminatees:* When current or former supervisors or agents of the charged party are charging parties or alleged discriminatees named in a charge, Board agents may contact and interview them about matters relating to their claim, without contacting or obtaining consent from the charged party's attorney.

If the Regional Office has any questions about the application of the above guidance, it should contact the Special Litigation Branch.

10058.3 Supervisors/Agents of Parties Not Represented by Attorneys

The following policies apply to contacts by Board agents with supervisors or agents of a party either not represented or represented by a nonattorney. For situations where a party is represented by an attorney, i.e., where MR 4.2 applies, see Sec. 10058.2.

(a) *Current Supervisors/Agents:* Where the party is not represented by an attorney and cooperation is being extended to the Regional Office in its investigation, the party's representative should be contacted and afforded the opportunity to make available for interview any current supervisor or agent of the party. This policy will normally apply in circumstances where:

- The Regional Office is receiving cooperation from the party and its representative, if any
- The party and such representative make the individual to be interviewed available with reasonable promptness so as not to delay the investigation and
- During the interview the party and such representative do not interfere with, hamper or impede the Board agent's investigation

(b) *Uncertain Supervisory/Agency Status:* Where the party is not represented by an attorney and a witness' supervisory or agency status is initially uncertain, a Board agent should inquire about the individual's status prior to conducting a substantive interview and proceed as follows:

- If it becomes clear that the individual is a supervisor or an agent of a party, the Board agent should not proceed with the interview without affording the party's representative the opportunity to be present if such party is cooperating.
- If it remains unclear whether the individual is a supervisor or an agent of a party, the Board agent should interrupt the interview and consult with the Regional Office.
- If the Regional Office concludes that the individual is a supervisor or agent of a party and the party is cooperating, the Board agent should not resume the interview without affording the party's representative the opportunity to be present.
- If, on the other hand, it becomes clear either through the preliminary interview or through consultations with the Regional Office that the individual is not a supervisor or agent of a party, the Board agent may conduct the substantive interview of the witness without informing the party or its non-attorney representative.

(c) *Party Not Cooperating:* If the party not represented by an attorney is not cooperating in the investigation within the meaning of Secs. 10054.1, 10054.5, and 10058.3(a), the Board agent may contact and obtain sworn testimony from individuals regardless of their supervisory or agency status without informing the party or its representative.

(d) *Former Supervisors/Agents of Parties:* Board agents may initiate contact with former supervisors and agents of parties who are not represented by an attorney and obtain affidavits from such individuals without informing the party or its representative. However, where the party is represented by an attorney, see Sec. 10058.2(d).

(e) *Current Supervisors/Agents Come Forward Voluntarily:* Where the party is not represented by an attorney, Board agents are also free to interview and obtain an

affidavit from current supervisors or agents who come forward voluntarily and indicate that they do not wish to have the party or its representative present, without informing the party or its representative.

10058.4 Third-Party Witness and Attorney/Representative

Witnesses who are not supervisors or agents of a party (herein third-party witnesses) have a right to be represented in Board agent interviews, as set forth herein. Thus, following notice to the Regional Office that a third-party witness is represented in the proceeding before the Agency, Board agents should follow the procedures described below.

(a) *Witness Represented by Nonparty Attorney:* Where the Regional Office has notice that a third-party witness is represented by an attorney who does not represent a party, Board agents must contact and obtain consent from the attorney before contacting or interviewing the witness. If the attorney refuses to consent, the Board agent cannot proceed to either contact or interview the witness, absent issuance of an investigative subpoena with notice to the attorney.

(b) *Witness Represented by Nonparty Representative:* Where a third-party witness is represented by an individual who is not an attorney and who does not represent a party, such representative should be afforded the opportunity to be present for the interview, so long as the representative's presence does not unduly delay or hamper the interview. If the presence of the representative unduly delays or hampers the interview, the Board agent may attempt to continue the interview without the representative or terminate the interview. In addition, the Regional Office may issue an investigative subpoena to the witness and exercise its discretion, considering all the circumstances, whether to give notice to the representative and/or allow the representative to be present at the interview.

(c) *Third-Party Witness and Party Attorney/Representative:* Longstanding Board policy provides that the attorney or other representative of a party to the case will not normally be allowed to be present at an interview of a witness who is not a supervisor or agent of that party. If the witness insists on the party attorney or representative being present, the Regional Office should exercise discretion whether to proceed with such an interview. If the Regional Office declines to proceed with the interview of the witness in the presence of such attorney or other representative, the Regional Office may issue an investigative subpoena to the witness without notice to the party's attorney or representative. Alternatively, the Regional Office may permit the witness to submit documentary evidence or a statement that, if timely submitted, will be considered.

If, however, it is asserted that an attorney of a party to a case also represents a third-party witness as an individual, both the attorney and the witness should be directed to provide written notice that the attorney represents the witness. If the circumstances raise questions as to whether a consensual attorney-client relationship exists or whether the attorney's interactions with an employee witness were consistent with employee Section 7 rights, including the dictates of *Johnni's Poultry Co.*, 146 NLRB 770 (1964), or if the Regional Office has a substantial basis to believe that the presence of an attorney of a party would impede the Agency's investigation, the Regional Office should consult with

the Special Litigation Branch on how to proceed. See also Sec. 10058.6, regarding the Board's rules requiring attorneys and other representatives at all stages of any Agency proceeding to conform to the standards of ethical and professional conduct required before the Courts.

If, however, the Regional Office is satisfied that there is a consensual attorney-client relationship, that the attorney has not violated the employee witness's Section 7 rights, and that the presence of the attorney would not impede the investigation, then the Regional Office, in its discretion, may decide to interview the witness, but it may do so only with the attorney present. Where appropriate, the Regional Office may issue an investigative subpoena with notice to the attorney. If, on the other hand, the attorney consents to an interview without the attorney's presence, the Board agent may proceed to interview the witness

If it is asserted that a non-attorney representative of a party also represents a third-party witness as an individual, the Regional Office may exercise its discretion whether or not to conduct the interview in the presence of such non-attorney representative. Alternatively, the Regional Office may issue an investigative subpoena to the witness without notice to the non-attorney representative.

10058.5 Response to Uncooperative Conduct by Parties

(a) *Charging Party:* If the charging party's attorney refuses to make a current supervisor/agent available for questioning, or if the Regional Office concludes that the charging party, its attorney or representative has interfered with, unduly delayed, or impeded the investigation, including the Board agent's interview, the Regional Office may:

- Contact the Special Litigation Branch to determine whether ex parte contacts and interviews are permitted by the applicable jurisdiction(s)
- Dismiss all or part of the charge for lack of cooperation
- Decide the case on the basis of the evidence otherwise obtained
- In limited circumstances, such as when the rights of others may be dependent upon the testimony or evidence from a charging party, issue an investigative subpoena for necessary documents or for an interview under oath with notice to the attorney or representative
- If a party is not represented by an attorney, the Board agent may directly contact and obtain sworn testimony from supervisors and agents. Sec. 10058.3.

(b) *Charged Party:* If the charged party's attorney refuses to make a current supervisor/agent available for questioning, or if the Regional Office concludes that the charged party, its attorney or representative has interfered with, unduly delayed, or impeded the investigation, including the Board agent's interview, the Regional Office may:

- Contact the Special Litigation Branch to determine whether ex parte contacts and interviews are permitted by the applicable jurisdiction(s)
- Decide the case on the basis of the evidence otherwise obtained
- Issue an investigative subpoena for necessary documents or for an interview under oath with notice to the attorney or representative
- If a party is not represented by an attorney, the Board agent may directly contact and obtain sworn testimony from supervisors and agents. Sec. 10058.3.

(c) *The Use of Subpoenas in the Above Circumstances:* An investigative subpoena for an interview under oath with notice to the attorney or other representative in the circumstances set forth above in (a) or (b) permits the Regional Office to conduct the interview in a formal setting by questions and answers. Sec. 11770.2.

10058.6 Misconduct by Attorneys or Party Representatives

The Board's Rules require attorneys and other representatives at all stages of any Agency proceeding to conform to the standards of ethical and professional conduct required before the courts. Sec. 102.177, Rules and Regulations and OM 97-2. Where appropriate, a Board agent should advise an attorney or other representative of the Board's Rules requiring that their conduct conform to the above noted standard.

Misconduct by attorneys or other representatives should, where appropriate, be referred to the Division of Operations-Management. Sec. 102.177(e), Rules and Regulations, OM 97-2 and OM 01-80. The range of consequences for violations of the Board's ethical and professional standards and for other misconduct include:

- Suspension and/or disbarment from practice before the Agency and/or other sanctions for misconduct of an aggravated character. Sec. 102.177(d), Rules and Regulations.
- Summary exclusion from a hearing for misconduct at a hearing before an Administrative Law Judge, hearing officer or the Board. Sec. 102.177(b), Rules and Regulations.
- Notification to the appropriate state bar(s), with additional notice to the ABA National Lawyer Regulatory Data Bank, of any disciplinary sanctions imposed on an attorney pursuant to the Board's Rules.
- Referral of the allegations to the state bar(s) in which an attorney practices, rather than pursuing action under the Board's misconduct Rules.

10058.7 Attorney-Client Privilege

Ethics rules generally prohibit eliciting attorney-client privileged information, absent an appropriate waiver by the client. When an organization is represented by an attorney, the relevant privilege exists between the organization and the attorney and, therefore, certain individuals, although 2(11) supervisors or 2(13) agents, may not be able to effectively waive the organization's privilege. If a Regional Office has a question about the application of this rule, any waiver or whether any exception applies, it should contact the Special Litigation Branch.

10060 The Affidavit

The face-to-face affidavit taken by a Board agent is the "keystone" of the investigation and is the preferred method of taking evidence from witnesses, particularly in category II and III cases. Affidavits set forth exactly what each witness recalls and provide a permanent record of the testimony, which can be relied upon in making a decision regarding the case. In taking an affidavit, the Board agent should record the testimony of the witness as accurately and in as much detail as is possible and appropriate. See also Sec. 10054.2.

10060.1 Non-Board Affidavits or Statements

Except in category I cases or other situations determined appropriate by Regional management, when affidavits or statements have been prepared and submitted by non-Board personnel (e.g., by the charging party), the witnesses should be re-interviewed on all pertinent points; they should not be asked merely to reswear to the accuracy of the previously submitted materials.

10060.2 Avoid Group Interviews

Even though a number of witnesses might have knowledge of the same incident, group interviews and mass affidavits should be avoided. The degree to which concerted questioning may serve to eliminate minor discrepancies is usually outweighed by the "corrective" pull on each participating witness and by the possibility that any such witness will fail to make an individual contribution that would be offered if interviewed privately.

10060.3 Achieving Confidence

Initially, Board agents should introduce themselves and explain the purpose of the interview. Board agents must clearly convey their complete neutrality, that they are merely seeking the truth and otherwise create an atmosphere conducive to achieving confidence. Board agents should develop a rapport with the witness, and, if appropriate, should appeal to the witness' sense of civic pride and remind the witness that the ability of the Agency to enforce the law is dependent upon their full cooperation.

10060.4 Site of Interview

Board agents should select interview sites which:

- Maximize privacy
- Enhance cooperation
- Avoid locations where employees might be unlikely to provide full and candid testimony, e.g., charged party's facility
- Avoid circumstances which could result in the interview being used as a pretext for a general employee or membership meeting and
- Provide a safe and appropriate environment for the Board agent and witness

10060.5 Assurances of Confidentiality

Affidavits taken by Board agents should contain the following statement regarding confidentiality:

I have been given assurances by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States Government and will not be disclosed unless it becomes necessary for the Government to produce the affidavit in connection with a formal proceeding.

An affidavit may be disclosed pursuant to Sec. 102.118(b), Rules and Regulations (Jencks Act) after a witness has testified in a Board proceeding and in some instances the affidavit may become public without the necessity of proceeding to a formal hearing (e.g., where the affidavits are attached to a petition for injunctive relief or where they are attached to a Motion for Summary Judgment). Where the witness has particular concerns about the consequences of providing an affidavit, the Board agent should explain that the Act proscribes retaliation against witnesses by either employers or labor organizations. Where the witness expresses a willingness to testify truthfully but wishes to avoid the appearance of favoring one side, the Regional Office should consider issuance of an investigative subpoena.

Board agents should not tell a witness that it will never be necessary to testify or that the Agency could provide "protection" under all circumstances.

10060.6 Testimony Reduced to Writing

The testimony should be reduced to writing at an appropriate time during the interview. Generally, the Board agent should review the witness' testimony before reducing it to writing. The witness should understand that the Board agent is memorializing the facts as the witness knows them and that the witness will be asked to sign and swear to the truth of what is being said. Affidavits should be written in the first person. Although they need not be verbatim, they should, to the degree possible, contain language used by the witness.

A typical affidavit opens with “I [name] being first duly sworn upon my oath, hereby state as follows.” It then recites the confidentiality assurances and sets forth the witness’ employer, home address, phone number, fax number, and e-mail address, if any. The affidavit concludes with “I have read this statement [have had this statement read to me], consisting of _____ pages, including this page, I fully understand its contents and I certify that it is true and correct to the best of my knowledge and belief.” When completed, the witness should read the affidavit or, if necessary, the Board agent or other individual should read the affidavit to the witness. The witness should be encouraged to make or point out any necessary corrections and should initial each page and each correction and sign the affidavit.

10060.7 The Oath

After the witness has read and, if necessary, corrected the affidavit, the Board agent should formally administer the oath. Section 11(l) of the Act. With both individuals’ right hands upraised, the Board agent should ask, “Do you solemnly swear/affirm that the affidavit you have just given is the truth, the whole truth and nothing but the truth, so help you God?”

Upon receiving an affirmative answer, the Board agent should complete and sign the jurat—“Subscribed and Sworn to Before me at _____ this _____ day of _____,” in the presence of the witness.

If the affiant refuses to execute the affidavit under oath, the affiant should be advised of the option to affirm and sign the affidavit. Finally, if the affiant declines to sign the affidavit, the Board agent should prepare a file memo outlining the circumstances of the interview and the reasons for the refusal to sign.

10060.8 Translation/Certification of Affidavits Taken in a Foreign Language

When an affidavit is taken in a foreign language and the Regional Office has it translated into English, the translator should add the following certification at the end of the affidavit:

I hereby certify that I am fluent in English and [insert name of foreign language being translated] and that the attached English language translation is an accurate translation of the attached [insert name of foreign language that was translated] language original affidavit.

Date

[Type name of translator]

10060.9 Copies of Affidavits

The Board agent, on request, should give a copy of the signed affidavit to the witness and obtain written acknowledgement of receipt. Except as set forth below, prior to the hearing, copies of affidavits should not be given to persons other than the

respective affiants. For production of affidavits during the hearing, see Sec. 10394.7. Copies of affidavits may be provided to counsel or other representative in the following circumstances:

- When a party to the case is represented by counsel or other representative and a witness who is an agent of such party, or the counsel or other representative, makes a written request to provide a copy of the affidavit to their counsel or representative
- When a witness who is not a supervisor or an agent of any party provides a written designation of counsel or other representative and the witness or counsel or other representative makes a written request that a copy of the witness' affidavit be provided to that counsel or representative

When an unrepresented affiant requests that a copy of his/her affidavit be provided to a counsel or other representative who also represents a party to the case, that request will normally not be honored. However, Regional Directors have discretion to honor such a request when they deem it appropriate.

10060.10 Telephone Affidavits

Although face-to-face interviews are the preferred method for obtaining an affidavit, in certain circumstances, after consultation with supervision, a telephone affidavit is appropriate. OM 99-75. When a telephone affidavit is taken, the Board agent interviews the witness by telephone, prepares a written affidavit and then sends the affidavit by mail or facsimile to the witness for reading, correction, and signature. When transmitting the affidavit to the witness, the Board agent should instruct the witness to:

- Read the affidavit carefully
- Make any necessary corrections
- Initial all changes and each page
- Sign and date the affidavit and
- Return the affidavit to the Regional Office promptly.

With regard to the oath, the Board agent may telephone the witness and administer the oath by telephone or may change the normal concluding paragraph of the affidavit so that instead of the witness certifying that the affidavit is true and correct to the best of the witness' knowledge and belief, it provides: "I state under penalty of perjury that the foregoing is true and correct."

10062 Amendments to the Charge**10062.1 Preparation**

A charge is amended by typing “Amended” (or “Second Amended,” “Third Amended”) before the word “Charge” on the regular charge form and by rewriting the contents of the charge to include the desired changes.

10062.2 Service of Copies

Copies of amended charges must be served on the charged party and other interested parties and appropriate counsel and other representatives for whom service is necessary. Service may be by regular mail and proof of service should be placed in the file. Sec. 11842.

10062.3 Assistance

The charging party, prior to Regional Office action, may file an amended charge. Board agents should, upon request, assist charging parties with the filing of such amendments. Sec. 10012.2.

10062.4 Filed after Dismissal

An amendment received after dismissal of a charge should be docketed as a new charge and assigned a new number.

10062.5 Allegations not Contained in Charge

Where the investigation uncovers evidence of unfair labor practices not specified in a charge, Board agents, with appropriate supervision, must determine whether the charge is sufficient to support complaint allegations covering the apparent unfair labor practices found. For example, the charge should allege the type of conduct, such as:

- Interrogation
- Threats of discharge
- Threats of violence
- Mass picketing

If the allegations of the charge are too narrow, not sufficiently specific or otherwise flawed, the charging party or its representative should be apprised of the potential deficiency in the existing charge and given the opportunity to file an amended charge. The charging party should also be advised that failure to file the amended charge may affect the Regional Office determination of the case and that any complaint can cover only matters closely related to the allegations of the charge.

10062.6 Amend to Correct Names and Delete Allegations

The Board agent should seek an amended charge when necessary to correct the names of parties or alleged discriminatees or to delete allegations which the Regional Office determines are without merit. With respect to amending charges after a Regional Office decision to issue a complaint, see Sec. 10264.1.

10064 Credibility Resolutions in Investigations

Regional Offices are expected to resolve factual conflicts only on the basis of compelling documentary evidence and/or an objective analysis of the inherent probabilities in light of the totality of the relevant evidence. In order to reduce credibility conflicts and permit administrative resolution of certain factual conflicts, the following observations may be helpful.

Factual conflicts may arise from a misunderstanding of the Board agent's questions or from the nature of the questions asked or the lack of specificity in the answers given. Asking the question in plain language may help resolve the conflict. Board agents should obtain factual details rather than the opinions and conclusions of the witnesses. Probing into details is appropriate in order to determine the reliability of a witness' memory. Board agents should stress the need for witnesses to testify to the specific language used in critical conversations, such as those involving 8(a)(1) or 8(b)(1)(A) statements. When a witness is contradicted regarding relevant testimony and further interview of the witness might help resolve the issue(s) administratively, the Board agent should re-interview the witness.

Third-party witnesses may often be helpful in providing evidence to assist in an administrative resolution of factual conflicts or credibility disputes. Thus, Regional Offices should, where appropriate, contact such witnesses and consider issuance of an investigative subpoena where necessary.

If, after applying the principles set forth above, the Regional Office is unable to resolve credibility conflicts on the basis of objective evidence regarding matters which would affect the Regional Office's merit determination, a complaint should issue, absent settlement.

10066 Remedial Bargaining Order Cases

The Regional Office should be aware that cases that involve a possible remedial bargaining order, such as *Gissel* type cases (*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)), present special investigation concerns, particularly with respect to proof of majority status.

10066.1 Authenticity of Cards or Other Documents

In all cases where an employer's alleged unfair labor practices are sufficient to require a remedial bargaining order, the Regional Office must determine the authenticity of authorization cards or other proof of majority status before issuance of a complaint

seeking such an order. Thus, the Regional Office should obtain evidence from the charging party regarding the facts and circumstances concerning the solicitation and procurement of cards or other documents (e.g., a petition), including the names of solicitors, such as union agents, who can authenticate such cards or other documents. Thereafter, the Regional Office should obtain affidavits from such persons relating to the cards or other documents that they can authenticate.

Alternatively, and particularly where a question concerning the circumstances of the signing arises, individual card signers may also be contacted and an affidavit taken from each of them. If the card signers are so numerous that it is not possible or practical to take an affidavit from each one, a questionnaire mailed to each card signer should be considered. Responses to such questionnaires would determine the particular witnesses from whom affidavits should be taken. Where, despite diligent effort, the Regional Office cannot locate card signers or qualified witnesses, it may be necessary to use expert testimony to determine the validity of the cards. Whatever the method, it is incumbent on the Regional Office in every case to undertake whatever investigation is reasonably required to determine the validity of the cards.

In order to ensure authenticity, Regional Offices should place a date-stamp on the reverse side of cards or other documents when received. In addition, all undated cards should be stamped "UNDATED" in the space for the date.

10066.2 Payroll Records

In order to determine the names of all unit employees and the potential majority status of the union at the relevant time, the Regional Office should seek appropriate payroll records from the employer. If the employer refuses the Regional Office's request to submit such records and the Regional Office has been unable by alternative means to determine the names of all unit employees, it should issue an investigative subpoena for the payroll records and other relevant documents bearing on the unit issue.

10066.3 Evidence of Forgery

Whenever investigation as to the authenticity of authorization cards discloses evidence of forgery, the Division of Operations-Management should be notified for the consideration of referral to the Department of Justice for further appropriate action. Depending upon the circumstances, further processing of the case may be suspended pending advice from Operations-Management with respect to further handling of the case. GC Memo 00-03.

10067 Where Unlawful Union-Security Clause Disclosed

An investigation of a charge alleging a discriminatory discharge or refusal to hire may also disclose the existence of a union-security clause in a contract which is unlawful on its face without referring to any extrinsic evidence. The Regional Office should, absent settlement, allege the unlawful clause in a complaint, provided that the allegations of the charge are sufficiently broad. The Regional Office should so proceed even though the charging party will not amend and the matters specifically alleged lack merit.

Where, on the other hand, an apparently unlawful but unwritten union-security practice is found in such a case, the charging party should be informed of this fact; if the party refuses to amend, the Regional Office should not pursue that issue.

10068 Conclusion, Report, Decision and Implementation

10068.1 Review and Supplemental Investigation

Prior to presenting the case for Regional Office decision, the Board agent, with appropriate supervision, must carefully review the case file to be certain that all relevant evidence is contained therein, including that bearing on material credibility conflicts. If additional evidence is required, the agent must expeditiously obtain it prior to presenting the case for Regional Office determination. In addition, the Board agent must also complete legal research to address all issues raised by the case to the extent necessary to make reasoned recommendations as to the disposition of all issues.

10068.2 Report and Determination

Cases may be presented for Regional Office determination at the conclusion of an investigation either by written or oral report to the Regional Director or other Regional Office official, pursuant to Regional Office policy. The Regional Director has the final authority and responsibility to make all casehandling decisions within the Regional Office.

(a) *Written Report:* The formats for written reports vary but all require a recitation of the allegations of the charge, the facts of the case, identification of the issues in dispute, an analysis of the facts and law and a recommended disposition. The Regional Office determination should be memorialized in writing.

(b) *Oral Agenda:* In lieu of a written report, a case may, depending upon Regional Office policy, be presented for determination orally to the appropriate designated Regional Office official. The presentation must contain the same elements described in (a) above and the determination should be memorialized in writing.

10068.3 Implementation of Determination

The Board agent normally is responsible for notifying the parties of the Regional Director's determination.

(a) *Meritorious Charge:* If the charge is determined to have merit, the Board agent must notify the parties and solicit settlement of the charge before complaint issues. Secs. 10124–10142.

(b) *Nonmeritorious Charges:* If no merit is found to the charge, the Board agent need inform only the charging party of the determination and the basis for it, and provide the charging party with an opportunity to withdraw the charge. Sec. 10120. If the charging party elects to withdraw, the charged party generally should not be informed of

the Regional Office's determination. If the charging party declines to withdraw, the charge should be dismissed promptly. Sec. 10122.

(c) *Deferral Charges:* If the Regional Office determines that the charge should be deferred, the Board agent should inform the parties and take the necessary steps to implement the Regional Office's determination. Sec. 10118.

10070 Violations of Other Statutes and Misconduct

Persons who bring to the attention of any member of the Regional Office staff evidence of a possible violation of other Federal statutes, independent of our processes and not uncovered during the investigation of a case, should be referred to appropriate authorities.

When potential violations of other statutes are uncovered during an investigation, Regional Offices are not required to obtain clearance from the Division of Operations-Management before referring such conduct to the appropriate agency. However, when the potential violation concerns possible criminal conduct related to Board proceedings (e.g., fraudulent authorization cards, perjury or obstruction of justice in connection with NLRB proceedings) and when referral of alleged unethical conduct of attorneys is involved, clearance from Operations-Management is required. Sec. 10058.6.

10070.1 Titles I-VI of Labor-Management Reporting and Disclosure Act

When possible violations of Titles I-VI of the Reporting and Disclosure Act are brought to the attention of a Board agent, the Regional Office should refer the matter to the nearest field office of the Office of Labor Management Standards, U.S. Department of Labor. The Region should notify the Division of Operations-Management of such referral.

10070.2 OSHA and MSHA

Certain conduct protected under the Act as union or concerted may also be protected under the Occupational Safety and Health Act and the Mine Safety and Health Act. Such situations arise most commonly in charges alleging retaliation for reporting safety concerns. The General Counsel has entered into agreements with both the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) setting forth procedures for handling such overlapping jurisdiction. GC Memos 75-29, 76-14, and 79-4 and OM 80-10.

10070.3 Obstruction of Justice and Perjury

Board agents should be sensitive to acts of obstruction of justice or perjury by individuals involved in Board proceedings. The Regional Office should report immediately any acts of alleged obstruction of justice or perjury to the Division of Operations-Management. Appropriate cases will be referred by Operations-Management to the Department of Justice for its consideration.